enunciated the essential requirements of a judicial decision: —

"... those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

In the present case, the main business of the court concerning the applicant was the charge in respect of the offence under sub-section (i) of section 92 of the Enactment. It was disposed of on the plea of guilty. A conviction under the sub-section is merely a step which enables the President or Deputy President, Town Council, to make the application; which in turn gives the court jurisdiction to determine it. There is nothing to show on the record who made the application for demolition or, if such an application was made, that prior notice of the application had been given to the applicant. Apparently the learned magistrate made the order as a matter of course after convicting the applicant of the offence.

On the face of the record, I find that the learned magistrate had no jurisdiction to make the demolition order because it was not made on the application of the President or Deputy President, Town Council. (In section 2 of the Enactment the word "President" is defined to include a Deputy President). The order is set aside.

I also set aside the conviction and sentence in respect of the offence under sub-section (ii) of section 92 and order that the fine of $100, if paid, to be refunded as the conviction and sentence rested upon a demolition order in respect of which the learned magistrate had no jurisdiction to make.

The President, Town Council, however is at liberty to make a fresh application to a magistrate under the provisions of sub-section (i) of section 92 of the Enactment. If such an application is made I am of the view that the matter should be heard before another magistrate who should bear in mind the principles which have been expressed by Bellamy J. in the above quoted case and which I have attempted somewhat to expand.

Demolition order, conviction and sentence, set aside.

Solicitors: *Yeow & Chin.*

MOHAMED ISA & ORS. v. ABDUL KARIM & ORS.

[O.C.J. (Raja Azlan Shah J.) June 22, 1970]

[Ipoh — Civil Suit Nos. 464 and 514 of 1969]

Land Laws — Malay Reservations — When ceases to be reserved land — Mining certificate issued in respect of reserved land — Mining lease subsequently issued — Agreements relating to land — Mining Enactment (F.M.S. Cap. 147) — Malay Reservations Enactment (F.M.S. Cap 142), ss. 4 and 5.

The facts and arguments as set out in the judgment of Raja Azlan Shah J. are as follows:-

These two cases concerned a piece of land in Malay Reservation, in respect of which a mining certificate was issued jointly to the first, second and third defendants. The mining certificate *inter alia*, stipulates that "the lessees shall not enter into mining contracts with non-Malays except for the purpose of constructional works only" and further "that the land hereby leased shall not be transferred except to such person or persons as may be approved by the Ruler in Council." The said certificate was later replaced by a mining lease for a period for ten years from the date of registration (*i.e.* on July 1, 1964).

A power of attorney was executed by the first three defendants in favour of the first and second plaintiffs and the fourth and fifth defendants on December 20, 1965, whereby they were empowered "to lease or sub-lease or sub-sublease or enter into any agreements or contracts with any person or persons, company or companies." This power of attorney was however, revoked on October 14, 1968.

By an agreement made on February 23, 1966 between the first and second plaintiffs and the fourth and fifth defendants for themselves and as attorneys of first, second and third defendants on the one part and Chew, Wong and Liew on behalf of the sixth defendants, Wan Seng Mining Company Sendirian Berhad (which was still not formed then) on the other part, it was agreed that Chew, Wong and Liew would be entitled to enter and to prospect for tin ore on the said land. The first, second and third defendants had themselves, on January 9, 1967, entered into a similar agreement with Chew, Wong and Liew on the same terms and by which they took an advance of $2,500 from Chew, Wong and Liew. On January 18, 1967, by an agreement between one Mohamed Zahari, Chew, Wong and Liew on the one part and one Madam Vu on behalf of the sixth defendants on the other part, the first party assigned and transferred all their rights, interests and benefits to the second party, on behalf of Wan Seng Company Sendirian Berhad (the sixth defendants).

On June 28, 1967, the first, second and third defendants executed a permit to mine for a period of one year from date thereof in favour of the first and second plaintiffs and the fourth and fifth defendants. This permit to mine was subject to yearly renewals. On the same day, a sub-lease was also executed by and in favour of the same parties for the period of the said mining lease and renewals and extensions thereof.

About a year later, *i.e.*, on August 22, 1968, the parties were supposed to meet at the office of Mr. Lal Harcharan Singh, an advocate and solicitor, to sign three documents purportedly in pursuance of the agreements made on February 23, 1966 and on January 9, 1967. All the three documents were apparently drawn in the names of the first three defendants on the one part and the first and second plaintiffs and the fourth and fifth defendants on the other part. The three documents were substantially in identical terms. The first and second plaintiffs did not turn up. For some reason or other their names were deleted from the three documents. There were also certain other deletions made so as to meet the parties' purposes. The three documents were: (1) a permit to mine for a period of one year from August 22, 1968 (hereinafter referred to as the First Permit to Mine); (2) another permit to mine for a year to take effect as from August 22, 1969, *i.e.* a year later after the First Permit to Mine has expired, (hereinafter referred to as Second Permit to Mine); (3) a sub-lease for the period of the mining lease and renewal or extensions thereof. In return for this the sub-lessors (*i.e.*, the first three defendants) were entitled to a tribute upon all ore removed from the said land at the rate of 12%. All these documents were executed on the same day. The First Permit to Mine was stamped on August 24, 1968 and recorded at the Mines Office, Ipoh on May 23, 1969. The Second Permit to Mine was stamped a year later (*i.e.*, on August 2, 1969), and the sub-lease was stamped on June 8, 1969. Subsequently, on September 14, 1968, the fourth and fifth defendants entered into an agreement with the sixth defendants employing the latter to mine the said land.

However, on January 21, 1969, the first, second and third defendants sub-leased the said land to the first and second plaintiffs for the period of the mining lease and renewals or

extensions thereof. This sub-lease was registered on February 7, 1969. By a memorandum of sub-sublease registered on August 7, 1969, the first and second plaintiffs sub-leased the said land to themselves and to the third plaintiff for the period of the mining lease and renewal or extensions thereof.

There was a suit (Ipoh High Court C.S. 235/1969) instituted by the first three defendants against the fourth and fifth defendants challenging the validity of the First Permit to Mine and asking for a declaration that the said permit to mine was void and ought to be set aside and also for delivery of the said permit to mine for cancellation. This civil suit has not yet been disposed of.

The plaintiffs claim that as sub-lessees, by virtue of the sub-lease registered on February 7, 1969, and/or as sub-sublessees, by virtue of the sub-lease registered on August 7, 1969, they have the exclusive right to enter upon, occupy and mine the said land and are entitled to vacant possession thereof for such purpose. They state that the fourth and fifth defendants have entered upon and occupied the said land by themselves and/or have permitted and authorised the sixth defendants to do so in pursuance of three agreements *i.e.*, the First and Second Permits to Mine and the sub-lease, all three of which were dated August 22, 1968 and a further agreement between the fourth and fifth defendants and the sixth defendants.

The plaintiffs contend that all the three agreements are illegal and/or null and void and of no legal effect and are not enforceable by law on the following grounds: (1) that the names of the first two plaintiffs have been deleted in the first three documents; (2) that the name of Lun binti Itam Mat Jamil alias Lun binti Mat Jamin given in the said 3 documents does not correspond with the name of Lun binti Itam Mat Jamin given in the mining certificate and (3) that under the permit to mine dated June 28, 1967 the first and second plaintiffs are entitled to renewal of the said permit in their favour and that since the first two plaintiffs have not waived, relinquished or renounced their rights thereunder at any time, the fourth and fifth defendants, in collusion with the sixth defendants, have acted in fraud of the rights vested in the plaintiffs, by entering into the two permits to mine and the sub-lease.

The plaintiffs further contend that the two permits to mine ought to be construed together as a single permit to mine for a term of 2 years since they were executed contemporaneously and are in identical terms and that they were so executed in order to circumvent the provisions of the Mining Enactment. Not being registered, neither of them is valid under the Mining Enactment. The sub-lease was never registered and that being for a term exceeding one year, is not valid by reason of non-registration. The plaintiffs alleged that the mining of the said land by the sixth defendants is a breach of one of the express conditions endorsed on the mining certificate rendering the certificate liable to forfeiture and would jeopardize and undermine thereby the very title and existence of the said mining certificate and the sub-lease and sub-subleases executed in favour of the plaintiffs who are consequently liable to be deprived permanently of their mining rights thereunder.

In the alternative, the plaintiffs contend that none of the three documents, being unregistered, would confer, as against the plaintiffs as registered sub-sublessees and/or sub-lessees, any right or title on any of the fourth, fifth or sixth defendants in respect of the said land. In any case, the said defendants on the date of institution of this suit *i.e.*, August 30, 1969 have no priority or preferential right or title over the plaintiffs to mine the said land.

The plaintiffs therefore claim vacant possession of the said land, general and special damages as against all the defendants, and as against the fourth, fifth and sixth defendants. They also pray for (1) a declaration that the said defendants have no right or title to carry on any mining or other operations on the said land and that any permit to mine held by them in respect of the said land is null and void and of no legal effect; (2) further and in the alternative, a declaration that the plaintiffs, as the registered sub-lessees and/or sub-sublessees have the exclusive right and title to enter upon, occupy and mine the said land for the period of the said mining certificate or lease and renewals or extensions thereof and that any permit to mine or other unregistered document relating to the mining of the said land held by the fourth, fifth and sixth defendants would not confer as against the plaintiffs as registered sub-lessees, any right or title upon any of the said defendants to enter upon, occupy and mine the said land during the said period; (3) an injunction to restrain the defendants, severally or jointly, and all persons claiming through the defendants from entering upon, occupying or remaining on the said land or mining the same; (4) a mandatory order that the defendants and each of them forthwith do pull down and demolish all structures and buildings erected by them thereon and remove therefrom all their materials and mining equipment thereon.

The first, second and third defendants admitted almost everything in the plaintiffs' statement of claim. They claim that they are unable to deliver possession of the said land to the first, second and third plaintiffs because the sixth defendants with whom the fourth and fifth defendants have entered into a contract are in wrongful occupation of the land. They contended that the First Permit to Mine is void because the fourth and fifth defendants subsequent to the execution of the documents have deleted the names of the first and second plaintiffs without their consent, and as such the fourth and fifth defendants do not have any right or benefit under the documents. They denied that they granted the Second Permit to Mine, and contended that fourth and fifth defendants knowing that they would not be able to get a permit to mine for the period commencing from August 22, 1969 had altered the memorandum of sub-lease signed by the defendants on August 22, 1968 so as to make the document pass off for a permit to mine. This alteration, they contended, rendered the document void. They also contended that the said sub-lease executed on August 22, 1968 was in favour of the first and second plaintiffs and the fourth and fifth defendants and denied that it was in favour of the fourth and fifth defendants only.

In their defence, the fourth, fifth and sixth defendants denied that the first, second and third plaintiffs have exclusive right to enter upon, occupy and mine the land and for vacant possession thereof. They admitted that the first and second plaintiffs' names had been deleted from the three documents and averred that they were in no way wrongful. They further averred that the non-correspondence of the third defendant's name in the three documents and in the mining certificate does not affect in any way the validity of any one of the three said documents. They denied that the two permits to mine which were in identical terms, executed contemporaneously were meant to circumvent the relevant provisions of the Mining Enactment. They also denied that the mining of the land by the sixth defendants is in breach of the conditions stipulated in the mining certificate. The defendant argued that though the land was gazetted as Malay Reservations, the land had been surrendered to the State and as such became State land under which the mining lease was issued by the Ruler-in-Council. From then on the said land was no longer under Malay Reservation.

The fourth, fifth and sixth defendants counterclaimed that by a sub-lease to the first and second plaintiffs, the first three defendants had acted in fraud of the rights vested in the sixth defendants, and that since the plaintiffs are a party to that fraud, the title or interest of the plaintiffs, though registered, was not indefeasible. They averred that the right, title and interest vested in the sixth defendants being prior in time and being free from fraud of any kind, prevail over the registered interest and title of the first and second plaintiffs. As regards the said sub-sublease they contended that the first and second plaintiffs cannot in law create a sub-sublease in favour of themselves and the third plaintiff and as such the purported creation is void. They therefore pray for an order that the proper registering authority make such memorials as may be necessary on the register and to issue documents of title relating to the said land so that the said land is no longer subject to the said sub-lease and to the said sub-sublease, and would be free of the said incumbrances. They also pray for an order that the plaintiffs deliver to the defendants the issue document of title relating to the said land and special damages at the rate of $800 a day.

Held: (1) the sub-lease executed by the two plaintiffs in favour of themselves and the third plaintiff is invalid but the sub-lease by the first, second and third defendants in favour of the first and second plaintiffs is valid;

(2) the documents executed on August 22, 1968 in favour of the fourth and fifth defendants were invalidated by the alterations made without the consent of the first three defendants and are therefore null and void;

(4) the two permits to mine and the sub-lease were void as they were done with intention of circumventing the provisions of the Mining Enactment;

(5) since the permits to mine as well as the sub-lease were void, the fourth and fifth defendants could not thereby have any right or title in the land as against the first and second plaintiffs the registered sub-lessees; and the fourth and fifth defendants could not as such enter into any agreement with the sixth defendants;

(6) even if they could the agreement is void, because it infringed the provisions of the Malay Reservations Enactment the conditions in the mining certificate and the provisions of the Mining Enactment.

Cases referred to:-

(1) *Chew Khan* v. *Lam Weng Yoon & Anor.* [1965] 2 M.L.J. 136.

(2) *Nathu* v. *Gomti* L.R. 67 I.A. 318.

(3) *Ho Giak Chay* v. *Nik Aishah* [1961] M.L.J. 49.

(4) *Idris bin Haji Mohamed* v. *Ng Ah Siew* [1935] M.L.J. 257, 259.

(5) *Melliss* v. *Shirley Local Board* (1885-6) 16 Q.B.D. 446.

(6) *Cope* v. *Rowlands* 2 M. & W. at p. 157; 150 E.R. 707.

(7) *Manks* v. *Whiteley* [1912] 1 Ch. 735.

(8) *Edwards* v. *Marcus* [1894] 1 Q.B. 587.

(9) *Whiteley* v. *Delaney* [1914] A.C. 132.

(10) *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1926] A.C. 101.

(11) *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491.

CIVIL SUIT.

P. Mooney (*J. R. Devadas* with him) for the plaintiffs.

M. Sivalingam for the 1st, 2nd and 3rd defendants.

P. P. Dharmananda for the 4th, 5th and 6th defendants.

Cur. Adv. Vult.

Raja Azlan Shah J. (stated the facts and arguments set out in the headnote above, and continued): The plaintiffs' claim in C.S. 464/69 being based on the sublease executed in favour of the first and second plaintiffs and in C.S. 514/69 being based on the sub-sublease executed in favour of the three plaintiffs, it must first be determined whether these leases are valid in order that the plaintiffs are entitled to challenge the rights of the defendants over the same piece of land. This point can be shortly disposed of on the analogy that a person cannot grant a valid tenancy to himself or to himself and another. (See *Chew Khan* v. *Lam Weng Yoon & Anor.*[1]). Accordingly, the sub-sublease in C.S. 514/69 executed by the first two plaintiffs in favour of themselves and the third plaintiff is invalid and since C.S. 514/69 cannot stand for this reason, there remains only C.S. 464/69, the sublease of which is not affected by the invalid sub-sublease in C.S. 514/69. The sublease in C.S. 464/69 being registered on 7th February 1969, is effective to transfer the rights of the first, second and third defendants to the first and second plaintiffs.

However, the fourth and fifth defendants claim that all such rights of the first, second and third defendants have already been transferred to them previous to this sublease *vide* the first and second permits to mine and the sublease, all of which were executed on 22nd August 1968. Since the legality of these three documents and a subsequent agreement employing the sixth defendants to operate the mine, is called into question by the plaintiffs, it becomes necessary to determine whether the first and second permits to mine and the sublease all executed on 22nd August 1968 and the subsequent agreement are rendered invalid either by (1) the non-correspondence of the third defendant's name in the three documents and in the mining certificate, the deletions of the first and second plaintiffs' names from the three documents and other alterations therein; or (2) the contravention of the provision of the Malay Reservations Enactment; or (3) the contravention of the provision of the mining certificate; or (4) the intention, in drawing up two similar permits to mine, to circumvent the provisions of the Mining Enactment.

I do not think that the non-correspondence of the third defendant's name in the three documents and in the mining certificate is material enough to affect the validity of the three documents, after considering the similarity between the name appearing in the three documents and that appearing in the mining certificate.

With regard to the alterations of the three documents, the only relevant section in the Evidence Ordinance is section 106 which reads: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." This seems to throw the onus of proving the alterations validly made upon the fourth and fifth defendants. For a clearer elucidation on the law regarding alterations of documents, reference can be made to *Halsbury's* Laws of England. There it is stated that the onus lies on the party who is claiming under the documents to explain the alterations and show when they were made. Alterations made before execution of the documents do not affect the validity of the documents. Any alteration appearing upon the face of the document is presumed, in the absence of evidence to the contrary, to have been made before the execution. If alterations are made in a material part of a document after its execution, by or with the consent of the parties thereto or persons entitled thereunder, but without the consent of the parties liable thereunder, the document is thereby made void. (See *Halsbury* 3rd Ed. Vol. 11 pages 379 and 367 respectively; see also *Nathu* v. *Gomti*[2]).

The onus therefore lies upon the fourth and fifth defendants to show that the alterations were made before the execution of the three documents in order that they can uphold the validity of these documents on this ground. In his evidence, the fifth defendant testified that the first, second and third defendants were the ones who gave instructions to delete the names of the first and second plaintiffs when the latter did not turn up at Mr. Lal Harcharan Singh's office in Ipoh.

the place where it was alleged the execution of the documents by first, second, third, fourth and fifth defendants took place. The first defendant, however, maintained that the signing of the three documents by the first three defendants took place at his house and his sister's house in his kampong. He was supported by one Haji Ahmad Shabki who asserted that the execution of the documents was not effected on 22nd August 1968 but on one Sunday when he accompanied certain people namely Mr. Au Ah Wah, Mr. Lai Kai Chee and Mr. Ho Fang Chew to the first and third defendants' house and after that to the second defendant's house. His presence during the execution of the documents was admitted by the first defendant. Haji Shabki maintained that the documents could not have been executed by the first three defendants in Mr. Lal Harcharan Singh's Ipoh office on the evening of 22nd August 1968, because on that day, he was working in Ulu Langat until 6.30 p.m. He produced an entry made in the attendance book. His superior officer substantiated his testimony of having worked on the 22nd August 1968 but admitted he could not state from his own personal knowledge at what particular time the entry of return was made by Haji Shabki; he agreed there was a possibility of the return entry having been made on the following morning when Haji Shabki came to work. However, in the absence of concrete evidence to the contrary, I accept as a fact that Haji Shabki was in Ulu Langat on 22nd August 1968. On the other hand Mr. Lal Harcharan Singh and the five defendants maintained that the execution of the documents by defendants one to five was effected in the former's office. However, Mr. Lal Harcharan Singh, in his affidavit in C.S. 235/69, affirmed that one Haji Mohamed Razali was also present in his office at that time. The fifth defendant in his evidence, denied the presence of this person, who according to him was sick at that time and he alleged that Mr. Lal Harcharan Singh had to travel to Kuala Kangsar to get his signature in connection with similar documents for the adjoining piece of land. This story being contradicted by Mr. Lal Harcharan Singh throws a doubt on the fourth and fifth defendants' evidence that the documents were executed in Mr. L. H. Singh's office. In view of these circumstances, it is more probable than not that the documents were executed by the first three defendants, not in Mr. L. H. Singh's office but in their respective houses.

With regard to whether the alterations were made before or after execution, the evidence clearly shows that the deletions of the first and second plaintiffs' names and certain other words therein were already on the documents when all the parties affixed their signatures. The first defendant affirmed both in his affidavit in C.S. 235/69 and in his evidence that the cancellations of the names were already there when he signed. The fifth defendant testified that the authentication of the deletions was done by Mr. L. H. Singh. In reply to a question, he said he did not know why he did not authenticate the deletion. This shows that when he affixed his signature, the deletions were already known to him. However, it is the case of the first three defendants that they did not intend to exclude the first and second plaintiffs from the documents and that they signed the documents under the belief that the permits to mine were renewals of the previous permit to mine dated 28th June 1967 in favour of the first and second plaintiffs and fourth and fifth defendants and accordingly that the documents they signed were also in favour of the first and second plaintiffs. The first defendant in his affidavit in C.S. 235/69 and in his evidence, stated that Haji Ahmad Shabki explained to him and to the second and third defendants that the permits were for first and second plaintiffs and fourth and fifth defendants as in the previous permit. Nobody, however, explained the deletions on the various pages of the three documents to him and he said that he was asked to sign on the various pages containing the deletions by Mr. Lai Kai Chee who did not give him any reasons. He further maintained that if he had been consulted about the deletions of the first and second plaintiffs' names, he would never have agreed and that the deletions were done without his consent. In the light of this fact, I cannot come to any other conclusion but that the documents are invalidated by the alterations made without the consent of the first three defendants.

In the alternative, even if it can be said that the validity of the documents cannot be affected by alterations made before the execution of them, the three documents are void on the ground of mistake, the first three defendants having signed the documents under the mistaken belief that they were to be executed in favour of the first and second plaintiffs as well as the fourth and fifth defendants. The first three defendants did not intend to contract merely with the fourth and fifth defendants, but they intended to contract and were under a mistaken impression that they were also contracting with the first and second plaintiffs in addition to the fourth and fifth defendants. I therefore hold the three documents null and void.

It is disputed by the fourth, fifth and sixth defendants that the said land still remains in the Malay Reservation. They argued that on surrender to the State and subsequently on the issue of the mining title by the State to the first three defendants, the said land became State land and thereby lost its character as Malay Reservations land, and as such it is no longer covered by the Malay Reservations Enactment. The issue before this court therefore is whether the said land is still in the Malay Reservation so as to render the agreement between the fourth and fifth defendants and the sixth defendants void being in contravention of the provisions of the said Enactment.

I think the defendants' novel argument is rather far-fetched. Section 2 of the Enactment defines Malay Reservation as one duly declared and gazetted under the provisions of the Enactment or of the Malay Reservations Enactment, 1913. It is not disputed that the said land was so gazetted in the *Gazette* notification of 8th September 1921 made under the provisions of the Malay Reservations Enactment, 1913. Where such land has been so declared to be in Malay Reservation it will lose its character only when it is duly revoked under the provisions of section 4(i)(b) which states:

"The Mentri Besar may at any time, with the approval of the Ruler of the State in Council by declaration published in the *Gazette* revoke any declaration whereby any land has been declared to be Malay Reservation, either as to the whole or any part of the area therein referred to."

I think section 4(i)(b) clearly contemplates that there need to be an express and not implied revocation, and such revocation has to be gazetted so as to be effective. There is no such *Gazette* notification declaring that it has been so revoked. To hold that an agricultural land in Malay Reservation when converted into mining land loses its character as a Malay Reservation land would, I think, be contrary to the intention of the Enactment which aims at preserving and protecting Malay interests. The preamble in the Enactment states that it is

"an Enactment to amend and consolidate the law relating to Malay Reservation and to provide for securing to Malays their interests in land."

The Enactment provides only one way by which a Malay Reservation land may lose its character — *i.e.*, by revocation under the provisions of section 4(i)(b). To hold otherwise than is contemplated by the Enactment would certainly defeat the whole purpose of the Enactment. Furthermore, under section 5 of the Enactment, any State land may be included in a Malay Reservation. Though the provisions of section 6(ii) had not been observed when the mining lease was issued, it would not, I think, take the said land out of Malay Reservation because there is nowhere in the Enactment which states that the non-observance of the provisions of section 6(ii) would have the effect of losing its character as Malay Reservation land. The section merely requires the collector of the district in which such land is situated to present to the proper registering authority a requisition in the proper form requiring him to note in his register of title the fact of the inclusion of such land in such Malay Reservation. This, I think, is merely an executive act and has no legal effect on the character of the land. In the circumstances, I think it would certainly be within the spirit and intendment of the Enactment that the said land unless so revoked under the provisions of section 4(i)(b) still retains its character as Malay Reservation land.

Being a Malay Reservation land, any dealings contrary to the provisions of the Enactment would render the said dealing void and of no legal effect (section 19). Section 7 of the Enactment provides that

"No State land included within a Malay Reservation shall be sold, leased or otherwise disposed of to any person not being a Malay."

The Enactment clearly prohibits dealings in respect of the said land with non-Malays, and as such the agreement between the fourth and fifth defendants and sixth defendants employing the sixth defendants to mine the land for tin ore is clearly one of those dealings prohibited by the Enactment. In *Ho Giak Chay* v. *Nik Aishah*[3] where the charges were executed over Kelantan Malay Reservation land to non-Malays, the court held that they were null and void as being contrary to the provisions of the Malay Reservations Enactment 1930, even though they were registered under the Kelantan Land Enactment. Hepworth J. in holding that the said charges were null and void said that a charge to a non-Malay vests in him a right or interest in Malay land and such right or interest is prohibited as it contravenes the provisions of the Enactment. Though in the present case it is a contract, by virtue of the said contract or agreement it vests in the sixth defendants, the right to enter upon the land, to install the necessary equipments and plants and to extract the ore from the land, and this I think clearly contravenes the provisions of the Malay Reservations Enactment. As Huggard C.J. (S.S.) in *Idris bin Haji Mohamed* v. *Ng Ah Siew*[4] at page 259 said:

"From these provisions (i.e., sections 7, 8, 9, 10, 13), it is clear that the intention of the Enactment was to preclude Malays from parting with any right or interest in Reservation lands, except to the very limited extent permitted by the Enactment, to persons of any other race."

I therefore hold that the said agreement employing the sixth defendants to mine the land is null and void.

It is also to be observed that it is one of the conditions of the mining lease/certificate that the lessees shall not enter into any mining contracts with non-Malays except for the purpose of constructional works only. The sub-leases and permits to mine granted by the first three defendants to the first and second plaintiffs and fourth and fifth defendants are governed by the conditions in the mining certificate and as such they are bound by the said conditions (section 18 of the Mining Enactment). Any contravention of the said conditions would render the said agreement/contracts void. Even assuming that the permits to mine and sub-lease granted to the fourth and fifth defendants on 22nd August 1968 are valid, their agreement with the sixth defendants is clearly in contravention of the conditions in the mining certificate and as such is void. Furthermore, section 120 of the Mining Enactment provides for a penalty in the form of a fine for any infringement of the conditions stipulated in the mining lease. It is settled law that where a contract is prohibited by statute such a contract is void though the statute inflicts a penalty only. (See *Melliss* v. *Shirley Local Board*[5]). A penalty often implies a prohibition (see *Cope* v. *Rowlands*[6]). But when the prohibition of an act is inferred from the infliction of a pecuniary penalty or a fine as in this case, it is necessary to determine whether the fine is imposed for the purpose of preventing the act from being done at all or only for the purpose of making the person who does it pay a certain sum of money. To determine this it is necessary to refer to the objects of granting mining leases to land under Malay Reservation. Clearly the object would be to secure such lands only to the Malays and to restrict or prevent them from dealing with the lands contrary to such objects. Such being the object, and reading section 120 in the light of such circumstances, I think that the purpose of that section is to prohibit such contracts from being entered into with a penalty imposed together with the prohibition. In the circumstances, the contract is void.

The next issue is whether the two permits to mine and the sub-lease purportedly executed on the 22nd August 1968 were done with the intention of circumventing the provisions of the Mining Enactment. It is not disputed that all the three documents were executed at the same time and were substantially in identical terms. Both the permits to mine were for a period of one year each, but the second permit to mine was only to take effect from the time the first permit to mine expired. The sub-lease was for the period of the

mining lease/certificate and the extensions or renewals thereof. The plaintiffs contend that the two permits to mine should be read together, thus constituting a single permit to mine for two years, and, by this act, they contend, that the defendants are trying to circumvent section 37 of the Mining Enactment thereby rendering the said permits to mine void. The said sub-lease would also be void under that section.

It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks* v. *Whiteley*[7]). This principle was followed in *Idris bin Haji Mohamed* v. *Ng Ah Siew, supra,* where Terrell J. at page 261 said:

"It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards* v. *Marcus*[8] (see also the dissenting judgment of Fletcher Moulton L.J. in *Manks* v. *Whiteley,* which was approved on appeal to the House of Lords, *sub-nominee Whiteley* v. *Delaney*[9])."

In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances, the two permits to mine should be read together as forming one permit to mine for a period of two years. The question now is this; whether it is invalid under section 37 of the Mining Enactment. Section 37 provides that any sub-lease granted for a term not exceeding one year shall be valid without registration, and I think, that it is a natural corollary from reading this section that a sub-lease for more than one year shall not be valid if it is not registered. As far as the sub-lease is concerned it is clearly invalid since it is for the period of the mining certificate/lease (which is for 10 years) and was not registered. But could it be said that section 37 also covers permits to mine or in other words could the permits to mine in law be equivalent to sub-leases? I have anxiously examined the two said documents and I have come to the conclusion that though the two documents were entitled as "Permit to Mine" they were in substance sub-leases. To the question whether by executing these two permits to mine and the sub-lease the defendants were trying to circumvent the provisions of the Mining Enactment, it can be answered simply by saying that such an intention can be gathered from the documents as a whole. There was no reasonable explanation as to the necessity of executing the Second Permit to Mine, which was to take effect only a year later and furthermore it would seem strange and rather suspicious why another sub-lease was needed when there were already two permits to mine. Moreover, the First Permit to Mine dated 28th June 1969 already contained a clause whereby the same was subject to yearly renewal and as such there is no necessity of executing a further permit to mine. In the circumstances, I am satisfied that the intention of the defendants could not have been anything else but to flout the law, and this court takes a serious view of those persons who flout the law for their own ends. Since the two permits to mine were in substance sub-leases and were not registered, they are therefore void under section 37 of the Mining Enactment, reading the two documents together as a whole. In the circumstances, the permits to mine are void.

The first and second plaintiffs also contend that under the permit to mine dated 28th June 1967, they are entitled to renewal of the said permit in their favour and since they have not relinquished or renounced their rights thereunder, the fourth and fifth defendants in collusion with the sixth, have acted in fraud of the rights vested in the plaintiffs by entering into the two permits to mine and the sub-lease. The fourth, fifth and sixth defendants counterclaim that it was the first and second plaintiffs with first, second and third defendants who had acted in fraud of their rights by virtue of the sub-lease granted by first, second and third defendants to first and second plaintiffs.

As far as the defendants' counterclaim is concerned I think it is without merit. It is settled law that fraud means actual fraud and not constructive or equitable fraud. To constitute fraud there must be a dishonest intention to cheat a man of his known existing right: (See *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.*[10]). Knowledge of an unregistered right does not of itself constitute fraud. (See *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.*[11]). In sub-leasing the said land to the first and second plaintiffs, the first, second and third defendants as well as the first and second plaintiffs could not be said to be acting with a dishonest intention to cheat the fourth or fifth defendants of their rights under the said permits to mine and the sub-lease of 22nd August 1968, when they had in the first place no such right under the said documents, or at least at that time they were already disputing the validity of the fourth, fifth and sixth defendants' rights under such documents. On the other hand, I think it is the fourth and the fifth defendants in collusion with the sixth defendants who had acted in fraud of the rights of the first and second plaintiffs. From the evidence of the first, second and third defendants it is clear that the three documents were intended to be executed as a renewal of the previous permit to mine (*i.e.,* that of 28th June 1967) and the first and second plaintiffs had not in any way relinquished or renounced their rights thereunder. It is clear that the first, second and third defendants had not consented to the execution of the two permits to mine and the sub-lease in favour of the fourth and fifth defendants only. They testified that they were not explained what the alterations in the documents were for except for being told that the documents were to be a renewal of the previous sub-lease and therefore in favour of the first and second plaintiffs as well. Looking at all the documents as a whole and noting the various deletions thereunder and the evidence above I think the dishonest intention on the part of the fourth and fifth defendants to deprive the first and second plaintiffs' rights to such renewals of the mining lease and permit to mine, and to transfer such rights only to themselves on the higher balance of probabilities is sufficiently established. The sixth

defendants had all the time been actively participating in this fraud, and were "rewarded" by the fourth and fifth defendants when they entered into an agreement employing them to mine the land, and which agreement was clearly in contravention of the provisions of the Malay Reservations Enactment and the Mining Enactment and the conditions in the mining certificate. In the circumstances I think fraud on the part of the fourth, fifth and sixth defendants on the higher balance of probabilities is sufficiently established.

Since the said permits to mine as well as the sublease are void, the fourth and fifth defendants could not thereby have any right or title in the land as against first and second plaintiffs, the registered sub-lessees; and the fourth and fifth defendants could not as such enter into any valid agreement with the sixth defendants. Even if they could, the agreement is void for the reasons stated earlier *viz.*, infringement of the provisions of the Malay Reservations Enactment, the conditions in the mining certificate and the provisions of the Mining Enactment.

Accordingly C.S. 514/69 is dismissed with costs. C.S. 464/69 as prayed with costs (one counsel). The third party costs is to be borne by the fourth, fifth and sixth defendants. Such costs to be taxed.

Order accordingly.

Solicitors: *J. R. Devadas; Lim Cheng Ean & Co.; Dharmananda & Co.*

ELIZABETH CHOO v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Raja Azlan Shah J.) June 25, 1960]

[Kuala Lumpur — Civil Suit No. 505 of 1968]

Negligence — Professional negligence — Anaesthetist performing pre-operation endoscopic examination — Standard of care and skill.

This was an action for personal injuries against the Government of Malaysia and the anaesthetist. It was alleged that owing to the negligence of the anaesthetist doing a pre-operation sigmoidoscopic examination the plaintiff suffered a perforation of the colon. As a consequence the plaintiff was unable to undergo a piles operation by reason of the nervous shocks she suffered from the perforation.

Held: having regard to the circumstances of this case the anaesthetist was competent to do the sigmoidoscopic examination and he had exhibited competent care and skill on the particular occasion and therefore negligence had not been established.

Cases referred to:-

(1) *Vancouver General Hospital* v. *MacDaniel & Anor.* (1934) 152 L.J. 56.

(2) *Hunter* v. *Hanley* (1955) S.L.T. 213 at p. 217.

(3) *Bolam* v. *Friern Hospital Committee* [1951] 2 All E.R. 118 at p. 122.

(4) *R.* v. *Bateman* (1925) 94 L.J. K.B. 791; [1925] All E.R. Rep. 45.

(5) *Rich* v. *Pierpont* (1862), 176 E.R. 16 at pp. 18 and 19.

(6) *Chin Keow* v. *Government of Malaysia & Anor.* [1967] 2 M.L.J. 45.

CIVIL SUIT.

S. D. K. Peddie for the plaintiff.

Ajaib Singh (Senior Federal Counsel) for the defendant.

Raja Azlan Shah J.: This is an action for damages for personal injuries against the Government of Malaysia and the anaesthetist. The plaintiff was admitted to the General Hospital, Kuala Lumpur for the purpose of piles operation but she left the hospital after 35 days without the operation being performed. Instead another operation had to be performed for the repair of her colon which was perforated due to the alleged negligence of the anaesthetist during the sigmoidoscopic examination. In consequence the plaintiff still suffers from haemorrhoids and is still unable to undergo the piles operation by reason of the nervous shocks she suffered from the perforation of her colon. She says she suffers and will continue to suffer pain and discomfort from her haemorrhoids.

The facts leading up to the present case can be briefly stated. The plaintiff is an employee of Messrs. Lindeteves-Jacoberg (Malaya) Sendirian Berhad, Kuala Lumpur. She consulted the company doctor, Dr. H. A. L. Wagner, with regard to her haemorrhoids and was recommended to see Mr. Alhady, the senior consultant surgeon, General Hospital, Kuala Lumpur. He admitted her and recommended an operation since he found that her haemorrhoids were at a very advanced stage. Before the operation a pre-operative sigmoidoscopic examination was to be performed by Mr. Alhady. He was then occupied and he delegated the examination to the anaesthetist. The anaesthetist performed the said examination under general anaesthesia. The sigmoidoscope which is about 16 cm. long is introduced into the rectum slowly using a certain amount of pressure. Great concentration is needed to see that the passage is not obstructed and that is done with the aid of the light in the instrument and by inflating the rectum with air. When the instrument reached the 13 cm. level the anaesthetist saw some blood and he was doubtful of some abnormal pathology. He consulted Mr. Alhady who carried out an immediate laparotomy when a small laceration was found and sutured and a temporary iliac sigmoid-colostomy carried out. It was also found that the plaintiff has a bicernuate uterus situated in front of the rectum. The colostomy was closed and the sigmoid colon replaced on October 4, 1967. She now bears two permanent scars on the upper and lower parts of her abdomen. The plaintiff made an uneventful convalescence except for some post-operative wound sepsis. She was later discharged.

Four particulars of negligence have been advanced against the anaesthetist:

(a) he failed to exercise due care and attention in the performance of the said sigmoidoscopy;

(b) he carried out the sigmoidoscopy after the administering of premedication to the plaintiff when he knew or ought to have known that the premedica-